

***United States Court of Appeals
for the Second Circuit***



**INTERVENOR'S
BRIEF**

74-1168

B
Pgs
65

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

CASE NO. 74-1168

NATIONAL ASSOCIATION OF INDEPENDENT
TELEVISION PRODUCERS AND DISTRIBUTORS,

Petitioner,

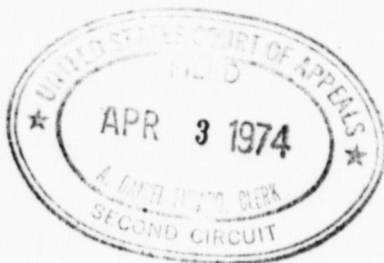
v.

FEDERAL COMMUNICATIONS COMMISSION
and UNITED STATES OF AMERICA,

Respondents.

ON PETITION FOR REVIEW OF REPORT AND ORDER
OF THE FEDERAL COMMUNICATIONS COMMISSION

BRIEF OF INTERVENOR
COLUMBIA BROADCASTING SYSTEM, INC.



J. ROGER WOLLENBERG
TIMOTHY B. DYK
SALLY KATZEN

WILMER, CUTLER & PICKERING
1666 K Street, N. W.
Washington, D. C. 20006

Of Counsel:

Eleanor S. Applewhaite
51 West 52 Street
New York, New York 10019

April 1, 1974

8

In the
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

NATIONAL ASSOCIATION OF INDEPENDENT)
TELEVISION PRODUCERS AND DISTRIBUTORS,)
)
Petitioner,)
)
v.)
)
FEDERAL COMMUNICATIONS COMMISSION)
and UNITED STATES OF AMERICA,)
)
Respondents.)

Case No. 74-1168

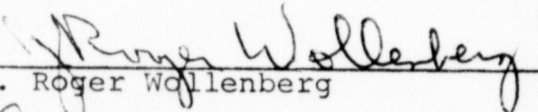
ON PETITION FOR REVIEW OF REPORT AND ORDER
OF THE FEDERAL COMMUNICATIONS COMMISSION

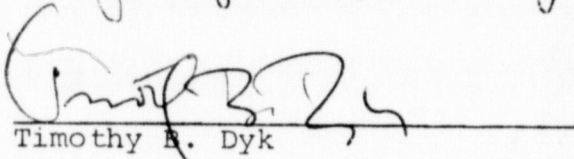
BRIEF OF INTERVENOR
COLUMBIA BROADCASTING SYSTEM, INC.

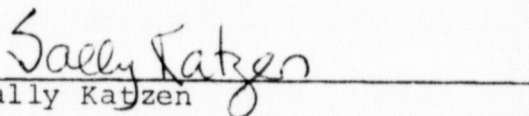
Pursuant to "Motion of Intervenor Columbia Broad-
casting System, Inc. for Leave To File Document in Lieu of
Brief", filed April 1, 1974 in the above-captioned case, the
document entitled "Opposition of Columbia Broadcasting System,
Inc. to Sandy Frank Program Sales, Inc.'s Petition for

For the reasons stated above, the Petition for
Reconsideration of Sandy Frank should be denied.

Respectfully submitted,


J. Roger Wollenberg


Timothy B. Dyk


Sally Katzen

WILMER, CUTLER & PICKERING
1666 K Street, N. W.
Washington, D. C. 20006

Counsel for Columbia
Broadcasting System, Inc.

Of Counsel:

Eleanor S. Applewhaite
51 West 52 Street
New York, New York 10019

April 1, 1974

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D. C. 20554

In the Matter of)
)
Consideration of the operation) Docket No. 19622
of, and possible changes in,)
the "prime time access rule",)
Section 73.658(k) of the)
Commission's Rules)

OPPOSITION OF
COLUMBIA BROADCASTING SYSTEM, INC.
TO SANDY FRANK PROGRAM SALES, INC.'S
PETITION FOR RECONSIDERATION

Columbia Broadcasting System, Inc. ("CBS") hereby
opposes the Petition for Reconsideration of the Federal Com-
munications Commission's ("Commission") Report and Order (FCC
74-80) amending Section 73.658(k) of the Commission's Rules
(originally known as the "prime time access" rule) filed on
March 18, 1974 by Sandy Frank Program Sales, Inc. ("Sandy
Frank").^{1/}

Introduction

CBS has been an active participant in this docket
and the predecessor docket (Docket No. 12782). It has

^{1/} (Hereafter "Petition".) Petitions for Reconsidera-
tion were also filed by MCA Inc., United Artists Corporation,
Motion Picture Association of America, Inc., and Screen Gems
Division of Columbia Pictures Industries, Inc. Screen Gems
has withdrawn its petition. MCA, United Artists and MPAA do
not object to that portion of the Report and Order which
lifts restrictions previously imposed by the original "prime
time access" rule. Therefore, we do not oppose those peti-
tions.

consistently opposed the imposition of artificial governmental restrictions on the freedom of television licensees to choose for broadcast programs from all sources. In Docket No. 12782, we urged that the proposed "prime time access" rule was unnecessary and unworkable, and would have serious adverse effects. In our comments and oral argument in this proceeding, we have affirmed that our experience with the rule confirmed our opinion that the adoption of the rule was ill-advised and that it should now be repealed.

A majority of the Commission was not persuaded that the rule should be repealed at this time and therefore the Report and Order which is the subject of the Petition reflects a compromise position. As the Commission correctly notes, "like many compromises, this will entirely please no one."^{2/} CBS is one of the parties dissatisfied with part of the Commission's decision.^{3/} But we strongly support the Commission's action in lifting, to some extent, the restrictions previously imposed by the "prime time access" rule. We

^{2/} Report and Order, ¶ 82.

^{3/} CBS in particular urged the Commission not to engage in program content regulation such as is reflected in the provision that one of the 7:30 - 8:00 p.m., Monday through Saturday, half hours may be network originated or off-network programming if it is a children's special, documentary or other public affairs program. In addition, although not stated in the rule, the Report and Order speaks of the expectation that a portion of the "cleared" time, if not total prime time, will be devoted to minority or children's programs or other programs directed to the needs and problems of the stations' community. (¶ 88.)

therefore oppose the Sandy Frank Petition for Reconsideration which seeks to have that action rescinded.

I. The Commission's Action in Lifting
Some Restrictions Is an Appropriate
Balancing of Competing Interests
and Is Not Premature.

Sandy Frank acknowledges that it is participating in this proceeding for the first time at "the eleventh hour"^{4/} and that it is "aware that the Commission has studied this matter for a long time, and has deliberated its decision with care."^{5/} Sandy Frank does not present significant new facts or new arguments in support of retaining the "prime time access" rule.^{6/} Nor does Sandy Frank allege that the Commission failed to consider in its Report and Order any relevant information or contention already in the record.

The Sandy Frank Petition reflects a prolix disagreement with the Commission's judgment. The Petition faults the Commission's analysis of the performance of the "prime time access" rule and its decision as to the appropriate action to be taken in light of that analysis. Sandy Frank advances two

^{4/} Petition, p. 1.

^{5/} Petition, p. 3.

^{6/} While Sandy Frank did not "file comments or otherwise participate formally in the proceeding" (Petition, p. 2), other distributors and producers of independent first-run syndicated programming with similar interests participated extensively in this proceeding. See Report and Order, App. B.

general arguments for reconsideration: first, that the amendments at issue are, in its view, inconsistent with the objectives announced by the Commission in adopting the "prime time access" rule;^{7/} and, second, that it is premature to modify the rule in view of the Commission's alleged "concession" that the rule has not yet had an adequate test.^{8/}

With respect to the former, Sandy Frank seems to believe that the objectives underlying the adoption of the "prime time access" rule are not only the "first principles",^{9/} but the only principles, that should govern the Commission's action. The Commission, however, was not so limited in its view of the issues involved in this proceeding. And since it referred throughout the Report and Order to other concerns relevant to its decision,^{10/} the most that can be said is that the Commission could have been even more explicit in explaining the various considerations upon which it relied.

The second argument is an even less persuasive ground for reconsideration. Initially, we note that the Commission's so-called finding that "the rule has [not] had a fair test" is specifically qualified by the next sentence: "at least in the sense that the somewhat mediocre showing so

^{7/} Petition, pp. 3-10.

^{8/} Petition, pp. 10a-11.

^{9/} Petition, p. 3.

^{10/} See generally Report and Order, ¶¶ 80, 82, 84.

far can be regarded as showing that nothing different is to be expected in the future."^{11/} In any event, Sandy Frank declares emphatically on several occasions that the rule has substantially achieved its objective.^{12/} If it is not premature for Sandy Frank to declare the rule a success, it is not premature for the Commission to conclude that it is not.^{13/}

In this connection, it is important to note that the Commission's power to adopt the "prime time access" rule was affirmed in Mt. Mansfield Television, Inc. v. Federal Communications Commission, 442 F.2d 470 (2d Cir. 1971). What the Commission has done here is simply to review the effects of that rule after an appropriate period of time, and then make whatever remedial adjustments are deemed advisable in view of the most current evidence of record. The decision to relax the "prime time access" rule reflects a disinterested, composite judgment of the Commission reached after careful consideration of experience under the rule. There is no reason to reconsider that decision merely because affected parties would prefer one tailored to their private interests.

^{11/} Report and Order, ¶ 89.

^{12/} See, e.g., Petition, pp. 8, 10a, n. 7, 21.

^{13/} The Commission's concern with the limited experience under the "prime time access" rule is offered as a justification for making only the modest modifications at issue here rather than a more substantial revision of the rule. See, e.g., Report and Order, ¶ 89.

II. The Commission Should Not Restore
the Full Restricted "Access" Period.

With respect to the specific provisions of the Commission's decision, Sandy Frank urges the Commission to "preserve the full opportunities for new programming which the access rule created".^{14/} At the outset, we believe it is confusing to speak in terms of "opportunities" since the relief requested by Sandy Frank is not an "opportunity" to have first-run syndicated programs broadcast from 7:00 - 8:00 p.m., but rather an access to that period on all affiliated television stations in the top 50 markets protected by Commission fiat against competition from network and off-network programs and feature films.

It cannot be overemphasized that there is absolutely nothing in the Commission's modified rule that restricts the production of first-run syndicated programs, the sale of such programs to affiliated or independent station licensees, or the broadcast of such programs at any time of the day or night by licensees. The restrictions in this area were found in the original rule, and, as noted above, they applied to network and off-network programs and feature films. In modifying the rule, the Commission did not turn the tables and restrict the broadcast of first-run syndicated programs. Rather, it simply

^{14/} Petition, p. 12.

relaxed, to an extent, the previously imposed restrictions.^{15/}

In any event, the modifications adopted by the Commission will not have the drastic effect that Sandy Frank claims. Sandy Frank objects primarily to the relaxation of the restriction on the 7:00 - 7:30 p.m. period, Monday through Friday.^{16/} The Commission explicitly found that this period "represents singularly little in the way of opportunity for the development of really new syndicated material."^{17/} Sandy Frank argues that this finding "is clearly erroneous",^{18/} although it does not dispute the facts relied upon by the Commission.^{19/}

Moreover, the Commission noted that the 7:00 - 7:30 p.m. period, Monday through Friday, was "not used by the

^{15/} While Sandy Frank appears to object to the use of the term "restriction" in this context, it does not dispute the fact that the "prime time access" rule was, in fact, a restriction against the use of certain programs. Petition, p. 18.

^{16/} Petition, p. 20.

^{17/} Report and Order, ¶ 79.

^{18/} Petition, p. 15.

^{19/} It also criticizes the Commission for being "a bit obsessed by the concept of newness in access time programming" (Petition, p. 15) but a cursory review of the Petition reveals that virtually every suggestion advanced by Sandy Frank is justified on the ground that it will promote "the new . . . syndicated programming the rule was designed to stimulate." Petition, p. 15a (emphasis added). See also, e.g., Petition, pp. 16, 31, 36, 37.

networks" before the rule.^{20/} CBS and NBC have already announced that they have no plans to offer programming in this period and ABC -- which supported the original rule restricting such programming -- will presumably do the same. Therefore, the only additional competition to first-run syndicated programs in the 7:00 - 7:30 p.m. period, Monday through Friday, made possible by the relaxations of the rule is that from off-network programs. Sandy Frank's fears that new syndicated programs will be unable to compete with off-network programs^{21/} is difficult to reconcile with its own claims as to the quality and success of first-run syndicated programs.^{22/}

III. The Commission Has Appropriately
Resolved the Problems Arising
under the "Prime Time Access" Rule.

The remainder of the Sandy Frank Petition is devoted to suggesting alternative ways of handling the various problems which arose under the "prime time access" rule. In each

^{20/} Report and Order, ¶ 79. The Commission was aware, of course, that affiliated stations that presented local news from 6:30 - 7:00 p.m. carried the network news from 7:00 - 7:30 p.m., and these stations continued to do so, with Commission permission, after the adoption of the rule.

^{21/} See, e.g., Petition, p. 15a, n. 11.

^{22/} Thus, Sandy Frank asserts on page 1 that several of the new first-run syndicated programs, including its own Treasure Hunt, have already won a place among the top ten shows in access time, and elsewhere notes that game shows are "among the most successful programs in access time . . . because [the audiences] like them and prefer them." Petition, p. 17, n. 12.

instance, Sandy Frank correctly identifies the problem and does not dispute that it is one that should be dealt with in this proceeding; it questions, however, the Commission's response to the problem. For example, with respect to "the development of stripped game shows", Sandy Frank agrees that "the Commission rightly expresses concern",^{23/} but to solve the problem Sandy Frank offers an additional restriction -- that of limiting multiple exposure of the same program series within the same week -- which it would apply to independent, as well as affiliated, stations in all markets. Similarly, it recognizes that the "prime time access" rule embroiled the Commission in comparing programs in passing on waiver requests, but its proposed solution is to cut back on the broadcast of admittedly "worthwhile" programs by simply denying all such requests.^{24/}

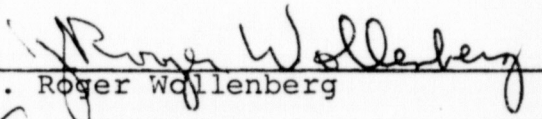
We recognize, of course, that there may be alternative ways of resolving the problems that have been identified, but we think the test on reconsideration should be whether the alternative chosen by the Commission is appropriate and reasonable. We think that test is met here with respect to the lifting of restrictions and the Commission should not be asked to disturb that judgment without good cause. No such good cause has been established.

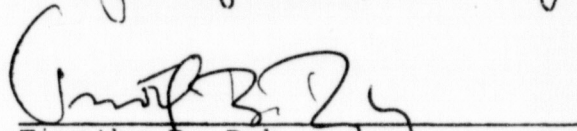
^{23/} Petition, p. 15a.

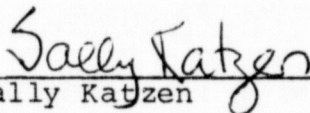
^{24/} Petition, p. 35.

For the reasons stated above, the Petition for
Reconsideration of Sandy Frank should be denied.

Respectfully submitted,


J. Roger Wollenberg


Timothy B. Dyk


Sally Katzen

WILMER, CUTLER & PICKERING
1666 K Street, N. W.
Washington, D. C. 20006

Counsel for Columbia
Broadcasting System, Inc.

Of Counsel:

Eleanor S. Applewhaite
51 West 52 Street
New York, New York 10019

April 1, 1974

CERTIFICATE OF SERVICE

I, Sally Katzen, do hereby certify that I have this 1st day of April, 1974, caused to be served the foregoing "Brief of Intervenor Columbia Broadcasting System, Inc." by mailing copies thereof by United States mail, postage prepaid, on the following:

James A. McKenna, Jr., Esq.
McKenna, Wilkinson & Kittner
1150 - 17th Street, N.W.
Washington, D.C. 20036
Counsel for American Broadcasting
Companies, Inc.

Herman W. Land
Executive Director of the Association of
Independent Television Stations, Inc.
One Rockefeller Plaza
New York, New York 10020

Daniel Ohlbaum, Esq.
Joseph A. Marino, Esq.
Office of the General Counsel
Federal Communications Commission
1919 M Street, N.W.
Washington, D.C. 20554

Howard E. Shapiro, Esq.
Chief, Appellate Section
Antitrust Division
United States Department of Justice
Washington, D.C. 20530

Robert D. Hadl, Esq.
Wilner & Scheiner
2021 L Street, N.W.
Washington, D.C. 20036
Counsel for MCA Inc.

Jay E. Gerber, Esq.
National Broadcasting Company, Inc.
RCA Building
New York, New York 10020

Howard Monderer, Esq.
National Broadcasting Company, Inc.
1800 K Street, N. W.
Washington, D. C. 20006

Katrina Renouf, Esq.
Margot Polivy, Esq.
Renouf, McKenna & Polivy
1532 - 16th Street, N. W.
Washington, D. C. 20036
Counsel for National Association of Independent
Television Producers and Distributors

Kenneth A. Cox, Esq.
John Wells King, Esq.
Haley, Bader & Potts
1730 M Street, N. W.
Washington, D. C. 20036
Counsel for Sandy Frank Program Sales, Inc.

Stuart Rabinowitz, Esq.
Paul, Weiss, Rifkind, Wharton
& Garrison
345 Park Avenue
New York, New York 10022
Counsel for Screen Gems Division of Columbia
Pictures Industries, Inc. and
Warner Bros., Inc.

Ronald S. Konecky, Esq.
Hardee Barovick Konecky & Braun
300 Park Avenue
New York, New York 10022

Pierson, Ball & Dowd
100 Ring Building
Washington, D. C. 20036
Counsel for Time-Life Films, Inc.

John Lane, Esq.
Ramsey L. Woodworth, Esq.
Hedrick and Lane
1211 Connecticut Avenue, N. W.
Washington, D. C. 20036
Counsel for Westinghouse Broadcasting Company, Inc.

Sally Katzen
Sally Katzen